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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 EARL CHILDS, Jr.,
12 CDCR #F-14068,

13 Plaintiff,

14
15 vs.

16
17 MATTHEW CATE, Director/Secretary;
18 PARAMO, Warden; HERNANDEZ,
19 Assoc. Warden; BENYARD, Correctional
20 Captain; WALKER, Medical Doctor;
21 J. PAYNE, Correctional Sergeant;
22 J. REYES, Correctional Officer; J. CHUA,
23 Doctor; STATE OF CALIFORNIA,

Defendants.

Civil No. 13cv2633 CAB (PCL)

ORDER:

**(1) GRANTING PLAINTIFF'S
MOTION TO PROCEED
IN FORMA PAUPERIS
[ECF Doc. No. 2]**

**(2) SUA SPONTE DISMISSING
COMPLAINT FOR FAILING TO
STATE A CLAIM PURSUANT
TO 28 U.S.C. §§ 1915(e)(2)
AND 1915A(b)**

AND

**(3) GRANTING PLAINTIFF'S
MOTION TO AMEND
[ECF Doc. No. 5]**

24 Earl Child, Jr., ("Plaintiff"), currently incarcerated at Richard J. Donovan
25 Correctional Facility ("RJD") in San Diego, California, and proceeding pro se, has
26 initiated a civil rights action pursuant to 42 U.S.C. § 1983.

27 Plaintiff claims Defendants, most of whom are RJD correctional and medical
28 officials, subjected him to cruel and unusual punishment and violated his right to due

process in September and October 2013. *See* Compl. (ECF Doc. No. 1) at 1, 4-6. Specifically, Plaintiff contends that on September 30, 2013, he was placed in Administrative Segregation (“Ad-Seg”) based on “false” confidential information provided by a fellow inmate. *Id.* at 5. Plaintiff claims to have had his “medical care appliances,” confiscated prior to placement in Ad-Seg, to have had “all privileges” suspended during his time there, and to have been denied due process based on an October 3, 2013 classification committee’s decision to retain him in Ad-Seg until transfer to another facility. *Id.* at 5, 6. Plaintiff seeks general and punitive damages, as well as “emergency injunctive relief” requiring the return of his medical appliances and his “legal work & property,” as well as court-ordered access to the law library and immediate release from Ad-Seg to RJD’s ‘C’ yard. *See* Suppl. to Compl. (ECF Doc. No. 3) at 3-5.

Plaintiff has not prepaid the civil filing fee; instead he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF Doc. No. 2). In addition, Plaintiff has filed a Motion seeking leave to “amend for the first time.” (ECF Doc. No. 5).

I. PLAINTIFF’S MOTION TO PROCEED IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee. *See* 28 U.S.C. § 1914(a).¹ An action may proceed despite the plaintiff’s failure to prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, if the plaintiff is a prisoner and is granted leave to proceed IFP, he nevertheless remains obligated to pay the entire fee in installments, regardless of whether his action is ultimately dismissed.

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¹ In addition to the \$350 statutory fee, all parties filing civil actions *on or after May 1, 2013*, must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a), (b); Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule (eff. May 1, 2013). However, the additional \$50 administrative fee is waived if the plaintiff is granted leave to proceed IFP. *Id.*

1 See 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir.
2 2002).

3 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act
4 (“PLRA”), a prisoner seeking leave to proceed IFP must also submit a “certified copy of
5 the trust fund account statement (or institutional equivalent) for . . . the six-month period
6 immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews*
7 *v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement,
8 the Court must assess an initial payment of 20% of (a) the average monthly deposits in
9 the account for the past six months, or (b) the average monthly balance in the account
10 for the past six months, whichever is greater, unless the prisoner has no assets. See 28
11 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the
12 prisoner must collect subsequent payments, assessed at 20% of the preceding month’s
13 income, in any month in which the prisoner’s account exceeds \$10, and forward those
14 payments to the Court until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2).

15 In support of his IFP application, Plaintiff has submitted the certified copies of his
16 trust account statements required by 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2.
17 *Andrews*, 398 F.3d at 1119. The Court has reviewed Plaintiff’s trust account statements,
18 as well as the attached prison certificate issued by a trust account official at RJD where
19 he is currently incarcerated verifying his account history and available balances.
20 Plaintiff’s statements show an average monthly balance of \$37.50, average monthly
21 deposits of \$25.00, and an available balance of \$19.83 at the time of filing. Based on
22 this financial information, the Court GRANTS Plaintiff’s Motion to Proceed IFP (ECF
23 Doc. No. 2) and assesses an initial partial filing fee of \$7.50 pursuant to 28 U.S.C.
24 § 1915(b)(1).

25 However, the Secretary of the California Department of Corrections and
26 Rehabilitation, or his designee, shall collect this initial fee only if sufficient funds in
27 Plaintiff’s account are available at the time this Order is executed pursuant to the
28 directions set forth below. See 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event

1 shall a prisoner be prohibited from bringing a civil action or appealing a civil action or
 2 criminal judgment for the reason that the prisoner has no assets and no means by which
 3 to pay the initial partial filing fee.”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C.
 4 § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based
 5 solely on a “failure to pay ... due to the lack of funds available to him when payment is
 6 ordered.”). The remaining balance of the \$350 total owed in this case shall be collected
 7 and forwarded to the Clerk of the Court pursuant to the installment payment provisions
 8 set forth in 28 U.S.C. § 1915(b)(1).

9 **II. INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(b)(ii) AND 1915A(b)(1)**

10 **A. Standard of Review**

11 Notwithstanding IFP status or the payment of any partial filing fees, the PLRA
 12 also obligates the Court to review complaints filed by all persons proceeding IFP and by
 13 those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of,
 14 sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
 15 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as
 16 practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
 17 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions
 18 thereof, which are frivolous, malicious, fail to state a claim, or which seek damages from
 19 defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v.*
 20 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v.*
 21 *Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

22 All complaints must contain “a short and plain statement of the claim showing that
 23 the pleader is entitled to relief.” FED.R.CIV.P. 8(a)(2). Detailed factual allegations are
 24 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by
 25 mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
 26 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining
 27 whether a complaint states a plausible claim for relief [is] ... a context-specific task that
 28 requires the reviewing court to draw on its judicial experience and common sense.” *Id.*

1 The “mere possibility of misconduct” falls short of meeting this plausibility standard.
 2 *Id.*; see also *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

3 “When there are well-pleaded factual allegations, a court should assume their
 4 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”
 5 *Iqbal*, 556 U.S. at 679; see also *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)
 6 (“[W]hen determining whether a complaint states a claim, a court must accept as true all
 7 allegations of material fact and must construe those facts in the light most favorable to
 8 the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that
 9 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

10 However, while the court “ha[s] an obligation where the petitioner is pro se,
 11 particularly in civil rights cases, to construe the pleadings liberally and to afford the
 12 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.
 13 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not, in
 14 so doing, “supply essential elements of claims that were not initially pled.” *Ivey v. Board*
 15 *of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague and
 16 conclusory allegations of official participation in civil rights violations are not sufficient
 17 to withstand a motion to dismiss.” *Id.*

18 **B. 42 U.S.C. § 1983**

19 “Section 1983 creates a private right of action against individuals who, acting
 20 under color of state law, violate federal constitutional or statutory rights.” *Devereaux v.*
 21 *Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of
 22 substantive rights, but merely provides a method for vindicating federal rights elsewhere
 23 conferred.” *Graham v. Connor*, 490 U.S. 386, 393–94 (1989) (internal quotation marks
 24 and citations omitted). “To establish § 1983 liability, a plaintiff must show both (1)
 25 deprivation of a right secured by the Constitution and laws of the United States, and (2)
 26 that the deprivation was committed by a person acting under color of state law.” *Tsao*
 27 *v. Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012).

28 / / /

1 **C. Improper Defendants**

2 **i. State of California**

3 As an initial matter, the Court finds that to the extent Plaintiff names the State of
 4 California as a Defendant in the caption of his Complaint, any claims he may wish to
 5 pursue must be dismissed sua sponte pursuant to both 28 U.S.C. § 1915(e)(2) and
 6 § 1915A(b) for both failing to state a claim and for seeking damages against a defendant
 7 who is immune. The State of California is not a “person” subject to suit under § 1983.
 8 *Hale v. State of Arizona*, 993 F.2d 1387, 1398-99 (9th Cir. 1993) (holding that the State
 9 and its Department of Corrections, which is an arm of the State, are not “persons” within
 10 the meaning of § 1983); *see also Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per
 11 curiam) (“There can be no doubt . . . that [a] suit against the State and its Board of
 12 Corrections is barred by the Eleventh Amendment, unless [the State] has consented to
 13 the filing of such a suit.”).

14 Therefore, to the extent Plaintiff seeks to sue the State of California pursuant to
 15 42 U.S.C. § 1983, his Complaint is dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii),
 16 (iii) and 28 U.S.C. § 1915A(b)(1) & (2).

17 **ii. Respondeat Superior**

18 Plaintiff also names Matthew Cate, the Secretary of the California Department of
 19 Corrections and Rehabilitation (“CDCR”), and D. Paramo, the Warden of RJD as
 20 Defendants. *See* Compl. at 1-2. However, his Complaint contains virtually no
 21 allegations that either of these individuals knew of or took any part in any constitutional
 22 violation. “Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must
 23 plead that each government-official defendant, through the official’s own individual
 24 actions, has violated the Constitution.” *Ashcroft*, 556 U.S. at 676; *see also Jones v.*
 25 *Community Redevelopment Agency of City of Los Angeles*, 733 F.2d 646, 649 (9th Cir.
 26 1984) (even pro se plaintiff must “allege with at least some degree of particularity overt
 27 acts which defendants engaged in” in order to state a claim).

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1 First, Plaintiff includes Secretary Cate and Warden Paramo as parties because they
2 are “responsible for the overall care of all California State Prisons” and “all prisoners at
3 RJD[]” respectively. *See* Compl. at 2. Plaintiff includes no further details as to what
4 Cate or Paramo specifically did, or failed to do, which resulted in the violation of any
5 constitutional right. *Iqbal*, 556 U.S. at 678 (noting that FED.R.CIV.P. 8 “demands more
6 than an unadorned, the-defendant-unlawfully-harmed-me accusation,” and that “[t]o
7 survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted
8 as true, to ‘state a claim for relief that is plausible on its face.’”) (quoting *Twombly*, 550
9 U.S. at 555, 570).

10 Thus, to the extent it appears Plaintiff seeks to sue Secretary Cate and Warden
11 Paramo only by virtue of their positions within the prison and/or their supervisory duties
12 over other correctional or medical officials, in order to avoid the respondeat superior bar,
13 his pleading must include sufficient “factual content that allows the court to draw the
14 reasonable inference that the defendant is liable for the misconduct alleged,” *Iqbal*, 556
15 U.S. at 678, and include a description of personal acts by each individual defendant
16 which show a direct causal connection to a violation of specific constitutional rights.
17 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor is only liable for the
18 constitutional violations of his subordinates if the supervisor participated in or directed
19 the violations, or knew of the violations and with deliberate indifference, failed to act to
20 prevent them. *Wilson v. Seiter*, 501 U.S. 294, 303 (1991); *Taylor*, 880 F.2d at 1045. If
21 there is no affirmative link between a defendant’s conduct and the alleged injury, as there
22 is none alleged here, there is no deprivation of the plaintiff’s constitutional rights. *Rizzo*
23 *v. Goode*, 423 U.S. 362, 370 (1976).

24 As currently pleaded, Plaintiff’s Complaint sets forth no facts which might be
25 liberally construed to support any sort of individualized constitutional claim against
26 Secretary Cate or Warden Paramo, both of whom are purportedly being sued based on
27 the positions they hold and not because of any individually identifiable conduct alleged
28 to have caused Plaintiff injury. “Causation is, of course, a required element of a § 1983

claim.” *Estate of Brooks v. United States*, 197 F.3d 1245, 1248 (9th Cir. 1999). “The inquiry into causation must be individualized and focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation.” *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo*, 423 U.S. at 370-71).

Based on these pleading deficiencies, the Court finds Plaintiff has failed to state a claim against either Cate or Paramo and his Complaint requires dismissal as to both these parties pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). *See Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446.

D. Cruel and Unusual Punishment Claims

Plaintiff alleges his “right to medical care/treatment” and the Eighth Amendment’s prohibition on cruel and unusual punishment were violated when Defendant Payne confiscated his medical appliances prior to placing him in Ad-Seg on September 30, 2013. Compl. at 4. Plaintiff alleges to have complained to various “counselors, nurses, [and] mental health Doctor Solarno, Soto, and [] Parker,” and was “seen by a nurse” named McFarthor (none of whom is named as a Defendant), who told him to make a request. Plaintiff alleges he did so on October 6, 7 and 8, 2013, and on October 9, 2013, was seen by “Dr. Mrs. Ch[au]” who “gave him two copies of [his] appliance chronos,” and told him to “file a complaint.” *Id.*

As to Plaintiff’s medical care, only “deliberate indifference to a [his] serious illness or injury states a cause of action under § 1983.” *Estelle v. Gamble*, 429 U.S. 97, 105 (1976). First, Plaintiff must allege a “serious medical need” by demonstrating that “failure to treat [his] condition could result in further significant injury or the ‘unnecessary and wanton infliction of pain.’” *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1991), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc) (citing *Estelle*, 429 U.S. at 104). “The existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual’s

1 daily activities; or the existence of chronic and substantial pain are examples of
2 indications that a prisoner has a ‘serious’ need for medical treatment.” *Id.* at 1059-60.

3 Here, Plaintiff identifies himself as a participant in the “mental health (EOP) unit,”
4 and contends he has medical “chronos” permitting his use of a “vision vest,” sunglasses,
5 contact lens & cleaner, [and] orthopedic soft . . . shoes,” *see* Compl. at 4, but his
6 Complaint contains no further factual content describing the nature of his physical of
7 mental condition or disability, or how the temporary denial of his medical appliances
8 while in Ad-Seg affected his daily activities, “result[ed] in further significant injury,” or
9 caused an “unnecessary and wanton infliction of pain.” *McGuckin*, 974 F.2d at 1059;
10 *see also Iqbal*, 556 U.S. at 678.

11 Second, even if Plaintiff had alleged a medical need that was sufficiently
12 objectively serious, he must also include in his Complaint enough factual content to
13 show that any of the individuals he has identified as Defendants were “deliberately
14 indifferent” to his needs. *McGuckin*, 974 F.2d at 1060; *see also Jett v. Penner*, 439 F.3d
15 1091, 1096 (9th Cir. 2006). “Deliberate indifference” is evidenced only when a prisoner
16 can show that the official he seeks to hold liable “kn[ew] of and disregard[ed] an
17 excessive risk to inmate health and safety; the official must be both aware of facts from
18 which the inference could be drawn that a substantial risk of serious harm exist[ed], and
19 he must also [have] draw[n] the inference.” *Farmer v. Brennan*, 511 U.S. 825, 837
20 (1994). Specifically, Plaintiff must allege “factual content,” *Iqbal*, 556 U.S. at 678,
21 which demonstrates “(a) a purposeful act or failure to respond to [his] pain or possible
22 medical need, and (b) harm caused by the indifference.” *Wilhelm v. Rotman*, 680 F.3d
23 1113, 1122 (9th Cir. 2012) (citing *Jett*, 439 F.3d at 1096). The requisite state of mind is
24 one of subjective recklessness, which entails more than ordinary lack of due care. *Snow*
25 *v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012) (citation and quotation marks omitted);
26 *Wilhelm*, 680 F.3d at 1122.

27 “Deliberate indifference is a high legal standard,” and claims of medical
28 malpractice or negligence are insufficient to establish a constitutional deprivation.

1 *Simmons v. Navajo County*, 609 F.3d 1011, 1019 (9th Cir. 2010) (citing *Toguchi v.*
2 *Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004)).

3 As currently pleaded, Plaintiff claims only that Defendant Payne denied him
4 access to medical appliances that were previously authorized by Dr. Chau when he
5 placed Plaintiff in Ad-Seg on September 30, 2013, “knowing” that Plaintiff could be
6 injured. *See* Compl. at 4. Plaintiff concludes that this denial amounted to “cruel and
7 unusual punishment.” *Id.* However, Plaintiff offers no further facts from which the
8 Court might plausibly infer that Payne, or any other named Defendant deliberately chose
9 to disregard a substantial or obvious risk to his health or safety. *See Farmer*, 511 U.S.
10 at 837. Nor does Plaintiff allege that he was ever *actually* injured as a result. *Resnick*,
11 213 F.3d at 449 (“In a constitutional tort, as in any other, a plaintiff must allege that the
12 defendant’s actions caused him some injury.”) (citation omitted).

13 Thus, without more, the Court finds that Plaintiff’s claims related to the denial of
14 his medical appliances contain only the “[t]hreadbare recitals of the elements of a[n]
15 Eighth Amendment] cause of action,” are “supported by mere conclusory statements,”
16 and therefore, “do not suffice” to state a claim upon which relief can be granted. *Iqbal*,
17 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555); *Lopez*, 203 F.3d at 1126-27; *Resnick*,
18 213 F.3d at 446.

19 **E. Due Process**

20 Plaintiff also claims his “due process rights” were denied because he was “placed
21 in Ad-Seg (hole) for no reason,” on September 30, 2013, and remained “locked up” as
22 of October 30, 2013, the date of the filing of his Complaint, “due to some confidential
23 inmate [who] made a false statement against [him].” *See* Compl. at 5. Plaintiff contends
24 that unspecified Defendants failed to “investigate t[he] matter,” and that as a result, he
25 has had to “sit in the dungeon” without privileges “pending [a] transfer” which “could
26 take up to 120 days or more.” *Id.*

27 The Due Process Clause protects Plaintiff against the deprivation of liberty
28 without the procedural protections to which he is entitled. *Wilkinson v. Austin*, 545 U.S.

1 209, 221 (2005). To state a due process claim, Plaintiff must first identify the interest at
2 stake. *Id.* at 221. Liberty interests may arise from the Due Process Clause itself or from
3 state law. *Id.*

4 The Due Process Clause by itself does not confer on inmates a liberty interest in
5 avoiding more adverse conditions of confinement, and under state law, the existence of
6 a liberty interest created by prison regulations is determined by focusing on the nature
7 of the condition of confinement at issue. *Id.* at 221-23 (citing *Sandin v. Conner*, 515
8 U.S. 472, 481-84 (1995)) (quotation marks omitted). Liberty interests created by prison
9 regulations are generally limited to freedom from restraint which imposes “atypical and
10 significant hardship” on the inmate “in relation to the ordinary incidents of prison life.”
11 *Id.* at 221 (citing *Sandin*, 515 U.S. at 484); *Myron v. Terhune*, 476 F.3d 716, 718 (9th
12 Cir. 2007).

13 In this case, Plaintiff has failed to establish a liberty interest protected by the
14 Constitution because he has not alleged, as he must under *Sandin*, sufficient facts related
15 to the conditions in Ad-Seg which show “the type of atypical, significant deprivation
16 [that] might conceivably create a liberty interest.” 515 U.S. at 486. For example, in
17 *Sandin*, the Supreme Court considered three factors in determining whether the plaintiff
18 possessed a liberty interest in avoiding disciplinary segregation: (1) the disciplinary
19 versus discretionary nature of the segregation; (2) the restricted conditions of the
20 prisoner’s confinement and whether they amounted to a “major disruption in his
21 environment” when compared to those shared by prisoners in the general population; and
22 (3) the possibility of whether the prisoner’s sentence was lengthened by his restricted
23 custody. *Id.* at 486-87.

24 Therefore, to allege a due process violation, Plaintiff’s Complaint must contain
25 sufficient “factual content that allows the court to draw the reasonable inference” that his
26 30-day stay in Ad-Seg imposed an atypical and significant hardship on him in relation
27 to the ordinary incidents of prison life. *Iqbal*, 556 U.S. at 678; *Sandin*, 515 U.S. at 483-
28 84. Plaintiff’s Complaint, however, fails to include any “further factual enhancement”

1 which might suggest any major disruption in his environment, any comparison to the
2 conditions of his previous confinement in the general population, or any mention
3 whatsoever as to its potential effect on the length of his sentence. *See Iqbal*, 556 U.S.
4 at 678 (citing *Twombly*, 550 U.S. at 556); *Sandin*, 515 U.S. at 486-87. Plaintiff must
5 offer more than “naked assertions devoid of further factual enhancement” in order to state
6 a due process claim; and instead must include “sufficient factual matter,” *id.*, which
7 demonstrates “a dramatic departure from the basic conditions” of his confinement that
8 would give rise to a liberty interest before he can claim a violation of due process.
9 *Sandin*, 515 U.S. at 485; *see also Keenan v. Hall*, 83 F.3d 1083, 1088-89 (9th Cir. 1996),
10 *amended by* 135 F.3d 1318 (9th Cir. 1998). This he has failed to do; therefore the Court
11 finds that Plaintiff has failed to allege a liberty interest in remaining free of Ad-Seg, and
12 thus, has failed to state a due process claim. *See May v. Baldwin*, 109 F.3d 557, 565 (9th
13 Cir. 1997) (concluded that prisoners have no liberty interest in remaining free from
14 administrative segregation or solitary confinement); *Toussaint v. McCarthy*, 801 F.2d
15 1080, 1091 (9th Cir.1985) (finding that administrative segregation is the type of
16 confinement that should be reasonably anticipated by inmates at some point in their
17 incarceration), *abrogated in part on other grounds by Sandin*, 515 U.S. 472; *see also*
18 *Myron*, 476 F.3d at 718 (finding no “atypical and significant deprivation” where prisoner
19 failed to allege conditions at level IV prison differed significantly from those at a level
20 III prison).

21 Indeed, in *Sandin* itself, the Supreme Court held that placing an inmate in
22 administrative segregation for thirty days, the same amount of time Plaintiff alleges he
23 spent in Ad-Seg at the time his Complaint was filed in this case, “did not present the type
24 of atypical, significant deprivation in which a state might conceivably create a liberty
25 interest.” 515 U.S. at 486.

26 Accordingly, the Court finds Plaintiff’s Complaint also fails to state a due process
27 claim as to any named Defendant upon which relief can be granted. *See Lopez*, 203 F.3d
28 at 1126-27; *Resnick*, 213 F.3d at 446.

1 III. PLAINTIFF'S MOTION TO AMEND

2 Plaintiff has also filed a Motion "to amend for the first time" in which he asks the
3 Court to "let [him] know what he needs to do to amend his case." *See* ECF Doc. No. 5
4 at 1.

5 Because Plaintiff is proceeding *in pro se*, and he has been provided with "notice
6 of the deficiencies in his complaint," the Court will also GRANT his Motion and provide
7 him with an opportunity to "effectively" amend. *See Akhtar v. Mesa*, 698 F.3d 1202,
8 1212 (9th Cir. 2012) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).²

9 IV. CONCLUSION AND ORDER

10 Good cause appearing, **IT IS HEREBY ORDERED** that:

11 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF
12 Doc. No. 2) is GRANTED.

13 2. The Secretary of the California Department of Corrections and
14 Rehabilitation, or his designee, shall collect the \$7.50 initial filing fee assessed by this
15 Order from Plaintiff's prison trust account, and shall forward the remaining \$342.50
16 balance of the full fee owed by collecting monthly payments from Plaintiff's account in
17 an amount equal to twenty percent (20%) of the preceding month's income and shall
18 forward payments to the Clerk of the Court each time the amount in the account exceeds
19 \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE
20 CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS
21 ACTION.

22 ///

23
24 ² Finally, the Court notes that while Plaintiff need not allege in his Complaint that he has
25 exhausted all administrative remedies as are available pursuant to 42 U.S.C. § 1997e(a), *see*
26 *Jones v. Bock*, 549 U.S. 199, 216 (2007) (concluding that the "failure to exhaust is an affirmative
27 defense under the PLRA, and . . . inmates are not required to specially plead or demonstrate
28 exhaustion in their complaints."), it appears from the face of his pleading that his purported
Eighth and Fourteenth Amendment may *not* have been fully exhausted prior to the initiation of
this suit. *See* Compl. at 7 (noting that Plaintiff "tried to exhaust, and will continue to do so.")
Plaintiff is hereby advised that "[t]he available remed[y] must be 'exhausted' *before* a complaint
under § 1983 may be entertained." *McKinney v. Carey*, 311 F.3d 1198, 1199 (quoting *Booth*
v. Churner, 523 U.S. 731, 738 (2001) (emphasis added)). "Exhaustion subsequent to the filing
of suit will not suffice." *Id.*

1 3. The Clerk of the Court is directed to serve a copy of this Order on Jeffrey
2 A. Beard, Secretary, California Department of Corrections and Rehabilitation, P.O. Box
3 942883, Sacramento, California, 94283-0001.


4 **IT IS FURTHER ORDERED** that:

5 4. Plaintiff's Complaint is DISMISSED without prejudice for failing to state
6 a claim pursuant to 28 U.S.C. §§ 1915(e)(2)(b) and 1915A(b); and

7 5. Plaintiff's Motion to Amend (ECF Doc. No. 5) is GRANTED. Plaintiff
8 shall have forty-five (45) days leave from the date this Order is entered into the Court's
9 docket in which to file a First Amended Complaint which cures all the deficiencies of
10 pleading noted above. Plaintiff's Amended Complaint must be complete in itself without
11 reference to his original pleading. *See* S.D. CAL. CIVLR 15.1; *Hal Roach Studios, Inc.*
12 *v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) ("[A]n amended
13 pleading supersedes the original."); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987)
14 (citation omitted) ("All causes of action alleged in an original complaint which are not
15 alleged in an amended complaint are waived.").

16 If Plaintiff fails to file an Amended Complaint within the time provided, this civil
17 action shall remain dismissed without prejudice and without further Order of the Court
18 based on Plaintiff's failure to state a claim upon which relief can be granted pursuant to
19 28 U.S.C. § 1915(e)(2) and § 1915A(b).

20
21 DATED: March 6, 2014

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23 
24 **CATHY ANN BENCIVENGO**
25 United States District Judge
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